

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34169

CONSOLIDATION COAL SALES COMPANY

v.

CONSOLIDATED RAIL CORPORATION

Decided: February 28, 2002

The Board is instituting a declaratory order proceeding to resolve a court-referred controversy between Consolidation Coal Sales Company (CCSC) and Consolidated Rail Corporation (Conrail) and is establishing a procedural schedule for the submission of further evidence and argument.

BACKGROUND

In May 1991, CCSC and Conrail entered into a 20-year Transfer and Storage Agreement (1991 Agreement) for services to be provided by CCSC for certain Conrail coal traffic at CCSC's terminal in Baltimore, MD. The 1991 Agreement provided, among other things, that CCSC would: (1) receive Conrail coal trains and unload and weigh the coal; (2) reassemble the trains after unloading; (3) stockpile the coal; and (4) eventually re-weigh and load the coal onto vessels for subsequent transportation. In return, Conrail agreed to pay CCSC at least \$4,000,000 in fees for these terminal-type services each year. Much, if not all, of the coal that Conrail intended to move through the CCSC terminal originated at mines on the Conrail-controlled lines of the former Monongahela Railroad.

In February 1992, CCSC and Conrail entered into a supplemental letter agreement (1992 Agreement) amplifying their contractual relationship. Among other things, the 1992 Agreement provided that Conrail would not establish any rates or enter into any contracts involving the line-haul movement of coal to the Baltimore area that discriminated against coal moving to the CCSC terminal or otherwise placed the CCSC terminal at a competitive disadvantage. (The 1991 Agreement and the 1992 Agreement will be referred to collectively as the 1991-92 CCSC/Conrail contract.)

By decision served on July 23, 1998, the Board approved the acquisition by CSX Corporation and CSX Transportation, Inc. (collectively, CSX) and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS) of control of Conrail and the division of Conrail's assets between them. CSX Corp. et al.—Control—Conrail Inc. et al.,

3 S.T.B. 196 (1998) (CSX/NS/Conrail). Pursuant to that authority, CSX and NS took control of Conrail on August 22, 1998, and divided the assets on June 1, 1999 (the so-called “Split Date”).¹ Since the Split Date, coal from mines formerly accessed solely by the Monongahela Railroad (Conrail) has been originated by CSX and/or NS, but, according to CCSC, this traffic has not moved via the CCSC terminal. CCSC notes that, since the Split Date, CSX has moved substantial coal tonnage to the Baltimore area, but virtually all of it via CSX’s terminal facility at Curtis Bay, and that, even though Conrail purportedly assigned its interests under the 1991-92 CCSC/Conrail contract to NS, NS has not moved any coal via the CCSC terminal either.

The matter before us originated when a Conrail shipper, Qit-Fer et Titane, Inc. (Qit), declined to pay a portion of charges owed to Conrail pursuant to a rail transportation contract on the grounds that Conrail had not delivered all of the coal that had been promised during 1995 and 1996. By an amended complaint filed in the United States District Court for the Eastern District of Pennsylvania in September 2000, Conrail sued both Qit for non-payment of \$670,000 pursuant to their contract, and CCSC for overpayment of its terminal fees under the 1991-92 CCSC/Conrail contract by the same amount, on the grounds that CCSC had lost and/or mishandled Qit’s coal.²

On February 12, 2001, CCSC counterclaimed, alleging that Conrail breached the 1991-92 CCSC/Conrail contract by refusing, beginning June 1, 1999, to pay the \$4,000,000 in annual terminal fees, and by entering into a consolidation agreement with CSX and NS that has placed the CCSC terminal at a competitive disadvantage. CCSC asks that judgment be entered against Conrail for the 1999 terminal fees (less \$800,000 Conrail had previously paid) and that Conrail be directed to compensate CCSC for any shortfall in minimum annual terminal fee payments CCSC may experience through 2011 (the end of the 20-year contract period), as a result of the diversion of certain line-haul movements of coal away from the CCSC terminal. Conrail’s position is that, by virtue of the Board’s approval of the CSX/NS/Conrail transaction, Conrail’s obligations under the 1991-92 CCSC/Conrail contract were terminated as of the Split Date.

Conrail’s contract action against Qit (and, in turn, against CCSC) has settled, leaving only CCSC’s counterclaim. By a “Stipulation and Order” entered in the District Court on November 29, 2001, CCSC and Conrail agreed to seek from the Board a definitive ruling on the nature and extent of Conrail’s post-Split Date obligations, if any, to CCSC under the terms of the 1991-92 CCSC/Conrail contract, in light of the Board’s authorization of the CSX/NS/Conrail

¹ Conrail retained some of its assets to conduct operations for the exclusive benefit of CSX and NS within three shared asset areas (SAAs), the North Jersey SAA, the South Jersey/Philadelphia SAA, and the Detroit SAA.

² Consolidated Rail Corp. v. Qit-Fer et Titane, Inc. & Consolidated Coal Sales Co., No. 00-CV-338 (E.D. Pa.).

transaction and any related rulings of the Board with respect to the acquisition and division of Conrail's operations by CSX and NS. These matters would include whether CCSC is entitled to minimum annual terminal fees from Conrail after the Split Date, and whether Conrail had any continuing obligation to help ensure the delivery to CCSC of coal movements originating from mines formerly served by the Monongahela Railroad that are now served only by NS and CSX. On December 20, 2001, the District Court concurred and ordered that the judicial proceedings be suspended for 6 months pending the issuance of a definitive ruling by the Board on the referred issues. The Court requested that the Board advise it of its answers to those questions by March 20, 2002.

By petition for declaratory order filed with the Board on January 24, 2002,³ CCSC specifically requests that the Board issue an order declaring: (1) that the 1991 Agreement was not terminated, or otherwise rendered without effect, by virtue of the Board's approval of the acquisition of control of Conrail by CSX and NS and the division of the assets of Conrail between them; (2) that Conrail remains obligated to pay CCSC, or to ensure payment to CCSC, of minimum annual terminal fees, through 2011, under the terms of the 1991 Agreement; and (3) that the diversion to CSX's Curtis Bay terminal facility of certain line-haul movements of coal emanating from mines serviced by the former Monongahela Railroad constitutes a breach of the 1992 Agreement, for which CCSC is entitled to damages.

By reply filed with the Board on February 11, 2002, Conrail asks that a procedural schedule be set for the submission, by CCSC and Conrail, of their evidence and legal arguments. Conrail suggests that the procedural schedule provide for simultaneous filings within 30 days and for simultaneous replies 15 days thereafter.

DISCUSSION AND CONCLUSIONS

CCSC and Conrail have raised, in the litigation now pending in the District Court, several issues respecting Conrail's obligations under the 1991-92 CCSC/Conrail contract. The Board has been asked to address whether, by virtue of the Board's authorization of the CSX/NS/Conrail transaction, Conrail's obligations under the 1991-92 CCSC/Conrail contract terminated as of the Split Date. Because the questions raised are essentially 49 U.S.C. 11321(a) preemption issues properly within the Board's primary jurisdiction, the Court has referred these issues to the Board. To address them, a declaratory order proceeding will be instituted under 5 U.S.C. 554(e) and 49 U.S.C. 721.

³ CCSC was unaware that a Board proceeding does not commence automatically upon a court referral, but rather only upon petition of the parties, and neither CCSC nor Conrail filed a petition with the Board until CCSC's petition was filed 35 days after the Court's order.

The procedural schedule adopted in this decision will reflect the essential nature of a 49 U.S.C. 11321(a) preemption issue. CCSC has alleged, in its counterclaim in the underlying litigation, that, by virtue of the 1991-92 CCSC/Conrail contract, Conrail is subject to certain obligations to CCSC. In response, Conrail has essentially asserted that, by virtue of CSX/NS/Conrail and 49 U.S.C. 11321(a), its obligations under the contract were terminated as of the Split Date. Conrail's argument is, in essence, an "affirmative" defense to CCSC's counterclaim, and, as the party raising the affirmative defense, it will bear the burden of going forward.

Both parties should include in their pleadings all necessary evidence and legal argument. In particular, Conrail should use its opening pleading to fully explain why its obligations under the 1991-92 CCSC/Conrail contract were terminated, as of the Split Date, by the Board's decision in CSX/NS/Conrail and 49 U.S.C. 11321(a). Conversely, CCSC should use its reply pleading to fully explain why Conrail's obligations under the contract were not so terminated. Both parties should keep in mind that: (1) the 1991-92 CCSC/Conrail contract appears to impose on Conrail two separate, though related, obligations – the obligation to pay \$4,000,000 per year in "take or pay" terminal fees and the obligation not to enter into any contract involving the line haul movement of coal to the Baltimore area that would place the CCSC terminal at a competitive disadvantage; (2) CSX/NS/Conrail does not contain an explicit reference to the 1991-92 CCSC/Conrail contract; (3) 49 U.S.C. 11321(a) provides that a person participating in a transaction approved by the Board under 49 U.S.C. 11321-25 "is exempt from the antitrust laws and from all other law . . . as necessary to let that . . . person carry out the transaction;" and (4) the 49 U.S.C. 11321(a) preemption of "all other law" effectively nullifies contracts as well as laws, provided that the nullification of any particular contract is necessary to let a person participating in a Board-approved 49 U.S.C. 11321-25 transaction carry out the transaction. See Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991).

Accordingly, a procedural schedule is adopted for Conrail to file within 15 days of this decision an opening pleading containing its evidence and arguments, for CCSC to file 15 days thereafter a reply pleading containing its evidence and arguments, and for Conrail, if it so chooses, to file 10 days thereafter a rebuttal pleading properly responsive to CCSC's reply pleading. The Board will endeavor to issue a decision as soon as possible after the close of the record.⁴

⁴ As indicated (supra note 3), the petition for declaratory order was not filed until well into the 90-day period in which the Court requested that the Board act. Although the Board will be unable to meet the March 20, 2002 date requested by the Court, it will endeavor to issue a decision by May 28, 2002, the end of the 6-month period for which the Court had suspended the judicial proceedings.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure (49 CFR part 1112), on the basis of written statements submitted by the parties. Both parties must comply with the requirements contained therein.

2. Conrail shall file, by March 15, 2002, its evidence and arguments on the issues presented.

3. CCSC shall file its reply by April 1, 2002.

4. Conrail shall file its rebuttal by April 11, 2002.

5. A copy of this decision will be served on:

United States District Court,
Eastern District of Pennsylvania
Office of the Clerk
U.S. Courthouse
601 Market Street, Room 2609
Philadelphia, PA 19106-1797

Attn.: Chief Judge James T. Giles

Re: No. 00-CV-338

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary